1995

Guilt, Reasonable Doubt and the Reasonable Woman

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Source: Hastings Women's Law Journal

Citation: 6 Hastings Women's L.J. 275 (1995).

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*Rory K. Little**

From all that appears in this special discussion issue of the *Hastings Women's Law Journal*, the O.J. Simpson double murder trial has made women angry. Terry Diggs assails "sexual dominion," "the culture of men," "deadly patriarchy" and "its malevolent notions"; she darkly asserts that "only the prospect of world peace is less likely" than the Simpson case aiding the campaign against domestic violence.[1] Maria Ontiveros decries the "vilification" during the trial of a female witness, Rosa Lopez, which affected Ontiveros viscerally; she berates the attorneys for "fail[ing] to take issues of . . . gender . . . into account" and closes with an angry warning to the male prosecutors that next time they might have her in the jury box instead.[2] Cynthia Lee attacks the "racial jokes and stereotypes" during the Simpson trial directed at Asian Americans;[3] her anger is smoldering, understated and thus all the more powerful. Finally, Crystal Weston condemns "the violence that women experience everyday," our "misogynist and indifferent culture," "the values of this sick nation," and Black "nationalist dispositions" as "especially harmful to Black women."[4]

Perhaps the common emotive element of these scholarly essays is unsurprising. There is little in general to like about the Simpson trial; it has exposed all the ugly "isms" of the criminal justice system (racism,

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1. Terry Kay Diggs, *Liars and Lycanthropes: Cultural Images in People v. Simpson*, 6 HASTINGS WOMEN'S L.J. 157, 161, 159, 163, 158 (1995).

2. Maria L. Ontiveros, *Rosa Lopez, David Letterman, Christopher Darden and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility*, 6 HASTINGS WOMEN'S L.J. 135, 135, 154, 155, (1995).

3. Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN'S L.J. 165, 172 (1995).

4. Crystal H. Weston, *Orenthal James Simpson and Gender, Class, and Race: In that Order*, 6 HASTINGS WOMEN'S L.J. 223, 225, 230, 230, 229 (1995).

sexism, capitalism, and "televism"[5]) in an unprecedentedly public, slow-motion way. Few individuals who are willing to admit they are lawyers have much good to say even now that the ordeal has ended.

Yet there seems to be more to these authors' anger than simply general distaste. Is the anger gender influenced? Of course, the lead women authors express anger about diverse topics: race, ethnicity, cultural violence and insensitivity, as well as gender. Moreover, these authors cut across racial and ethnic lines, and their pieces address multifarious aspects of the criminal justice system. Yet the anger of the women writing in this discussion issue seems consistently stronger than that expressed by the men. For example, while Tom Morawetz (the symposium's only male lead author[6]) perceptively identifies a number of aspects of the trial as "disturbing," his critique lacks the personal tone expressed by Diggs, Lee, Ontiveros, or Weston.[7]

The lead women authors also share another commonality besides anger; each author asserts, assumes, or ignores the guilt of the defendant.[8] Is this not also unsurprising? If O.J. Simpson did kill, then his primary victim[9] was not just a woman but also his former spouse, who had escaped him after years of physical victimization; victimization that the criminal justice system softens by labeling "domestic violence," and which Simpson defense attorneys trivialized as "marital discord."[10] Empirical

5. This tone pun is intended to convey all the ills flowing from the live televising of criminal trials, which many trial lawyers have decried for years but which the general public has seen largely only in this trial. *See generally* Rory K. Little, *No Cameras in the Courtroom*, 42 FED. LAW. 28 (1995).

6. The structure of this issue is that five authors have led off with essays (Diggs, Lee, Morawetz, Ontiveros, and Weston) and four authors are "responding" in some way (Boswell, Floyd, Little, and Scallen).

7. Thomas Morawetz, *Fantasy, Celebrity and Homicide*, 6 HASTINGS WOMEN'S L.J. 209, 209 (1995). This is by no means intended as a normative evaluation of Morawetz's essay, which is stimulating and scholarly. The point is solely to contrast the emotive content of the essays.

8. Weston directly asserts that, "I believe O.J. Simpson is guilty." Weston, *supra* note 4, at 230. For the other three authors, Simpson's guilt or innocence is clearly secondary to the foci of their anger; yet to the extent the articles imply any finding, it is guilt, not innocence. *E.g.*, Diggs, *supra* note 1, at 158 ("assuming *arguendo* the truth of the prosecutor's case"). Certainly the authors ignore the central trial issue—whether Simpson murdered his ex-wife and Ron Goldman. Their anger has led them to issues they find central. It must be noted that, of course, these essays were written before any verdict was returned, and the jury returned an acquittal. People v. Simpson, No. BA097211, 1995 WL 704381 at *2 (Cal. Super. Trans. Oct. 3, 1995) *available in* WESTLAW, OJ-TRANS.

9. Ron Goldman was also murdered in this case. The focus here is on Nicole Brown Simpson, however, because she appears to have been the *intended* victim, and thus a victim of spousal violence. Goldman, while no less the victim of a murderer, apparently was an unintended object, slaughtered by happenstance. *See infra* notes 11-14.

10. Haya El Nasser, *Domestic Conflict Could be Trial's Wild Card/Court Arguments Begin Today on What Simpson Jury Will Hear*, USA TODAY, Jan. 11, 1995, at 8A.

evidence indicates that women victims of male partner violence are often later murdered by the same men.[11] If this happened too to Nicole Simpson, and her murderer has been acquitted, then Nicole Simpson has become another vivid symbol of the criminal justice system's failure for women.[12] We ought not be surprised, then, by the anger of women regarding this case.[13] It is anger born not of a simple murder case, nor even of a murder case gone awry, but of a *spousal* murder case.[14]

The element of spousal violence, and the unprecedented familiarity many observers have with the O.J. Simpson case, provides a heightened occasion to examine a relatively unconsidered issue—the perspective that jurors should assume when evaluating doubt in a criminal case. Can, or should, a "reasonable woman" concept inform the criminal law's conception of a "reasonable doubt?" Rather than advocate a definite answer in this brief essay, I wish simply to open the issue and note some implications.

I. The Concept of Reasonable Doubt

The concept of reasonable doubt is reasonably well understood with regard to the high standard of proof it embodies. But the issue of juror perspective is unconsidered and full of contradiction in the reasonable doubt context.

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11. "Nearly thirty percent of all women murdered in America are killed by their husbands or boyfriends . . . ." Susan E. Bernstein, Note, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARDOZO L. REV. 525, 525 (1993). "'90% [of these murdered women] had called the police at least once for protection.'" *Id.* at 534 (quoting David Holmstrom, *Efforts to Protect Women from 'Stalkers' Gain Momentum at State, Federal Levels*, CHRISTIAN SCI. MONITOR, Dec. 22, 1992, at 4). Still others have been battered but have never registered a recorded call. *See* BATTERED WOMEN 14 (Donna M. Moore ed. 1979) (stating that abused wives report "less than 10%" of batterings). These statistics are surely disturbing even if off by some order of magnitude. *But see* Armin Brott, *Battered Statistics*, SACRAMENTO BEE, Aug. 7, 1994, at F1 (alleging serious gaps and flaws in the statistics often used in the domestic violence debate).

12. Weston states this view particularly bitterly: "it was a misogynist and indifferent culture that allowed O.J. to batter Nicole for half of her life." Weston, *supra* note 4, at 230.

13. This is not to suggest that such anger is felt by women only. Many men, too, are angered by perceived failings of the criminal justice system in this case, including failings related to spousal violence.

14. Of course, Nicole and O.J. were no longer married at the time of the killings. That fact, however, merely emphasizes the horror of spousal violence; separation and divorce often provide no escape. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64-65 (1991).

A. DEFINING THE LEVEL OF CERTAINTY FOR REASONABLE DOUBT

The idea that a special, high standard for certainty ought to govern criminal cases "was recurrently expressed from ancient times,"[15] and shares worldwide acceptance.[16] The linguistic formulation for this high standard as "beyond reasonable doubt" was common at common law,[17] and was adopted as a constitutional requirement of due process in *In re Winship*.[18] The phrase is so well known that it seems safe to say that most Americans—not just lawyers—know it and understand its significance for criminal trials. Through television, literature, and barroom debate, "not guilty until proven beyond a reasonable doubt" has entered the American psyche.[19]

Yet the precise content of the centuries-old concept continues to escape agreed-upon description. In this, the concept of "beyond a reasonable doubt" may be like a "prime" number in mathematics: indivisible into lesser components. Only last year, the U.S. Supreme Court in *Victor v. Nebraska* found itself entirely unable to agree on a palatable definition of "reasonable doubt."[20] Although the Court left in place a conviction that rested (in part) upon a definition stating that jurors should feel "an abiding conviction, to a moral certainty" in order to convict, the Justices were careful to state unanimously that "we do not condone the use of the phrase."[21] In the course of that decision, the Court noted that Massachusetts Justice Shaw's 1850 definition, which subsequently became the national standard for defining reasonable doubt, began by pointing out that

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15. *In re* Winship, 397 U.S. 358, 361 (1970) (quoting CHARLES T. MCCORMICK, EVIDENCE § 321 at 681-682 (1954)).

16. *See* Jon O. Newman, *Beyond 'Reasonable Doubt,'* 68 N.Y.U. L. REV. 979, 982 (1993) (The principle "that an adjudication of guilt in criminal matters requires a high degree of certainty" is "widely shared throughout the world's legal systems . . . .").

17. *See Winship*, 397 U.S. at 361; CHARLES T. MCCORMICK, EVIDENCE, § 341 (Edward W. Cleary ed., 3d ed. 1984).

18. *Winship*, 397 U.S. at 364.

19. *See generally* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 457-58 (1989).

20. Victor v. Nebraska, 114 S. Ct. 1239 (1994) (four separate opinions).

21. *Id.* at 1245-48. The federal courts generally have rejected the "moral certainty" definition. *See, e.g.*, United States v. Indorato, 628 F.2d 711, 720-21 (1st Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980). Ironically, while it was the criminal defendant in *Victor* who was objecting to the "moral certainty" standard as too low, that standard is generally disliked by prosecutors, who often find that injection of conceptions of "morality" into the struggle for certainty sets the standard too *high* for some jurors to convict. *See* Newman, *supra* note 16, at 983 (moral certainty instruction is "especially favored by defense attorneys").

"[i]t is a term often used, probably pretty well understood, but not easily defined."[22]

While frowning on "to a moral certainty," the *Victor* Court also criticized the use of "strong probabilities" and "substantial doubt" as linguistic surrogates for reasonable doubt.[23] Three Justices also criticized a common definitional instruction, the "hesitate to act" allegory.[24] Justices Blackmun and Souter could not approve even the limited instructions the majority allowed.[25] And while Justice Ginsburg endorsed the Federal Judicial Center's proposed reasonable doubt instruction as "clear, straightforward, and accurate," her opinion was not joined by any other Justice.[26] Finally, another common definition of reasonable doubt, "doubt based on reason" or "for which you can state a reason," is easily criticized as too high a standard and a linguistic "distortion of the concept."[27] What definition should be given to the concept when all in use today are so criticized?

If the Supreme Court is divided and cautious about attempting to define reasonable doubt, the lower courts are even more skeptical. A number of circuits have opined that trial judges are often better off if they provide no further definition at all.[28] As Justice Shaw noted 145 years ago, the phrase by itself is "probably pretty well understood."[29] Even if this

22. Commonwealth v. Webster, 59 Mass. 295, 320 (1850) *quoted in Victor*, 114 S. Ct. at 1244. The pithy accuracy of this statement suggests that Justice Shaw would have made a fine trial judge in the Simpson case.

23. *Victor*, 114 S. Ct. at 1249-51.

24. Justice Ginsburg wrote separately to condemn the "hesitate to act" instruction. *Id.* at 1252 (Ginsburg, J., concurring). As given in *Victor*, the instruction was that "'[r]easonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions in life, to pause and hesitate before taking the represented facts as true and relying and acting thereon." *Id.* at 1249. But, as noted by the Federal Judicial Center in commentary to its Pattern Jury Instructions in 1987, such important decisions "generally involve a very heavy element of uncertainty and risk-taking . . . wholly unlike the decisions jurors ought to make in criminal cases." Federal Judicial Center, Pattern Jury Instructions, Instruction 21 *in* MODERN FEDERAL JURY INSTRUCTIONS: CRIMINAL: PATTERN INSTRUCTIONS FJC 1, 18-19 (1991) [hereinafter FJC Instruction 21]. *See also* Newman, *supra* note 16, at 982-85.

25. *See Victor*, 114 S. Ct. at 1254 (Blackmun, J., concurring in part and dissenting in part).

26. *Id.* at 1253 (Ginsburg, J., concurring).

27. Newman, *supra* note 16, at 983.

28. *See* United States v. Nolasco, 926 F.2d 869, 871-72 (9th Cir. 1991) (en banc) (collecting cases); *e.g.*, United States v. Lawson, 507 F.2d 433, 442-43 (7th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

29. Commonwealth v. Webster, 59 Mass. 295, 320 (1850). *But cf.* Newman, *supra* note 16, at 984-85 (reporting a study of 22 mock trials in which juries hearing a reasonable doubt instruction convicted more often than juries that heard a "feel sure and certain" instruction).

claim is too strong, it is accurate if amended only slightly by adding "or at least as well understood as anything else we have come up with."[30]

It may be true that "beyond a reasonable doubt" is a concept "pretty well understood" with regard to the degree of certainty required to convict in a criminal case. Most everyone understands that "beyond a reasonable doubt" means not "absolute certainty,"[31] but yet far more than more likely than not. "Abiding conviction," "firmly convinced," so certain that you would lock someone up for it—we generally get it insofar as the level of proof is concerned.

B. DEFINING JURORS' PERSPECTIVE: MUST DOUBT BE OBJECTIVELY REASONABLE OR IDIOSYNCRATICALLY REASONED?

While the near unanimity of advice against further defining the concept of reasonable doubt certainly gives one pause, the Simpson case nevertheless provides occasion to examine the concept of reasonable doubt from a different angle. What is the function of "reasonable" in "reasonable doubt?" Of course it acts as some sort of a qualifier, a "screen" for doubts, eliminating as a block to conviction silly or fanciful doubts. But does it also tell anything about the proper perspective of the jurors' inquiry? Does the concept of "reasonable doubt" contain an assumed perspective of "an objective, reasonable juror?" Or does reasonable doubt really mean "idiosyncratic doubt"—a doubt reasonable to a particular juror, perhaps, yet "unreasonable" to the bulk of objective observers at large?

This question of appropriate juror perspective—unanswered in any reasonable doubt instruction I have seen—is not irrelevant in the context of the Simpson case, even now that the verdict is in. If—and I am hypothesizing, not asserting—women perceive issues related to domestic violence differently from men,[32] and if resolution of any of those issues was necessary to accept the prosecution's claim that Nicole Simpson's domestic batterer subsequently killed her, then a dual-gendered jury ought to have considered whose perspective (man, woman, "reasonable person")

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30. *See* Miles v. United States, 103 U.S. 304, 312 (1880) ("Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury.").

31. It is not absolute because "[t]here are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt." FJC Instruction 21 *supra* note 24, at FJC 19. *See also* Victor v. Nebraska, 114 S. Ct. 1239, 1248 (1994) ("A fanciful doubt is not a reasonable doubt.").

32. *See* Kate E. Bloch, *A Rape Law Pedagogy*, 7 Yale J.L. & Feminism 307, 329 (discussing techniques to "advance a discussion on whether gender differences influence perceptions of rape"). *See also* Robin D. Weiner, Note, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143 (1983) (regarding potential gender differences in perceiving violent crime). *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

the "beyond a reasonable doubt" concept required them to assume as jurors. Even if the Simpson case provides only a jumping-off point, the question seems relevant to a deeper understanding of the criminal jury system in general.

When one reviews the many reasonable doubt definitions in play today (*Victor* provides a good survey), they are uniformly silent as to juror perspective. That is, they say nothing explicit about what perspective, what persona, a juror ought to adopt when evaluating the evidence in a criminal case. This is certainly true of the reasonable doubt instruction actually given in the Simpson trial, which is the standard California definition:

> Reasonable doubt is defined as follows. It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.[33]

This does not tell jurors anything about deliberative perspective. That is, it does not say anything like "when evaluating the evidence for doubt, you should adopt the perspective of the ordinary, reasonable person," versus something like "you should apply your own subjective ideas of what is reasonable." An oblique reference to "the minds of the jurors" reminds us that human minds, not identical computer programs, will be considering the case. But if "jurors' minds" can differ, then so too may their perspectives. For all the anxiety about defining the level of certainty, our reasonable doubt instructions spend no energy at all on guiding twelve diverse jurors about perspective.

C. OBJECTIVE VERSUS SUBJECTIVE PERSPECTIVES

Reasonable doubt's silence on perspective seems mildly surprising. The criminal law is often expressly concerned with perspective; must facts in a criminal case be considered from a defendant's subjective perspective or from that of a "reasonable" outsider? "Reasonable" is generally used in the law to identify an "objective" basis for evaluation, conveying both a lack of idiosyncratic subjectivity and some sense of majoritarian, or shared communitarian, values. The "reasonable man"—now more appropriately "reasonable person"—is the law's objective "Everyman," representing an effort to remove individual variance and irrationality from

33. *Court TV: People v. Simpson* (Court TV broadcast, Sept. 22, 1995). *See* 1 CALIFORNIA JURY INSTRUCTIONS, CRIMINAL § 2.90 (rev. 5th ed. Supp. July 1995).

an aspirationally uniform system of societal regulation. "Reasonable" generally means "leave your personal peccadillos at home," and examine the situation from some shared perspective.[34]

Triers of fact are often expressly instructed to view the evidence from the perspective of a "reasonable" person when considering other aspects of the criminal law. For example, the American Law Institute's Model Penal Code (MPC) instructs jurors to examine mens rea and risk from the perspective of "a law-abiding person."[35] Some courts have ruled that, when self-defense is at issue, the perspective of a "reasonable victim" should be assumed.[36] In contrast, when a non-objective perspective is desired, the MPC makes it definitionally clear; for example, manslaughter is defined as murder committed upon "reasonable" provocation, but with the provocation evaluated "from the viewpoint of a person in the actor's situation."[37]

Thus, evaluative perspective is generally of large concern to drafters of criminal rules. Yet when we tell jurors to apply the "reasonable doubt" evaluative standard, we tell them nothing about perspective. Moreover, it is highly debatable what perspective we want criminal jurors to assume. Do we intend criminal jurors to apply some objective, majoritarian perspective in evaluating doubt or to apply their own individualistic, subjective evaluations? The case law contains conflicting suggestions,[38] and the answer seems far from clear.[39]

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34. *See* G. FLETCHER, RETHINKING CRIMINAL LAW 247 (1978); S. KADISH & S. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 461, 479 (5th ed. 1989); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 175 (5th ed. 1984) (The "reasonable man" is "a personification of a community ideal of behavior, determined by . . . social judgment."). *See generally* Robert Unikel, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 328-30 (1992).

35. *See* MODEL PENAL CODE § 2.02(2)(c) & (d) (American Law Institute, Final Official Draft 1962) [hereinafter MPC] (defining "recklessly" and "negligently," respectively); *id.* §§ 3.05(1)(b), 5.01(1)(a).

36. *E.g.*, People v. Goetz, 111, 497 N.E.2d 41, 50 (N.Y. Ct. App. 1986) (noting that the N.Y. legislature adopted a "reasonable belief" standard for self-defense in order to require some objective element and not "allow citizens to set their own standards" for when self-defense is appropriate). *See* Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV., 435, 437, 467-68 (1981) (rejecting a "reasonable woman" standard in favor of more generalizable language that is "more subjective" and yet permits "the jury [to] uphold . . . community standards").

37. MPC, *supra* note 35, § 210.3(1)(b).

38. *Compare, e.g.*, Ballew v. Georgia, 435 U.S. 223, 234 (1978) (suggesting that juror deliberation requires "application of the common sense of the community") *with* State v. Robbins, 199 N.E.2d 742, 744 (Ohio 1964) ("Proof beyond a reasonable doubt is a subjective individual standard rather than a group standard.").

39. Professor Richard Uviller has described a similar tension between "objective" and "subjective" views of reasonable doubt. Richard Uviller, *Acquitting the Guilty: Two Case*

For example, another standard California jury instruction, given to the Simpson jurors immediately before they retired to deliberate, states that:

> The People and the defendant are entitled to *the individual opinion of each juror*. Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. *Each of you must decide the case for yourself*, but should do so only after discussing the evidence and instructions with the other jurors. Do not hesitate to change an opinion if you are convinced it is wrong. However, *do not decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.*[40]

The title of this instruction in the CALJIC form book is "Individual Opinion Required";[41] it is unconnected to, and does not mention, the reasonable doubt instruction. Yet it sounds strongly like "idiosyncratic" doubt, not objectively reasonable doubt.

Indeed, the popular conception of the ideal criminal jury, embodied in the film "Twelve Angry Men"[42] and the heroic hold-out juror, enshrines "individualistic doubt" as not only the correct perspective but a perspective vital to implementation of the right to trial by jury in criminal cases.[43] Similarly, at least one common reasonable doubt definition—"doubt for which *you* can state a reason"[44]—plays directly to an individualistic perspective. The CALJIC "Individual Opinion" instruction virtually directs that it is every citizen's "right" to evaluate a criminal case as he or she sees fit, regardless of the contrary views of other jurors. It could be argued that "individualistic doubt" is the embodiment of the American conception of the criminal jury itself. There is nothing "reasonable," in

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Studies on Jury Misgivings and the Misunderstood Standard of Proof, 2 CRIM. L.F. 1, 30 (1990). He appears to assert, as the correct view, that a juror's "personal conclusion" must control. *Id.* at 31-32. Yet he gives this assertion no analysis and spends the bulk of his article on levels of certainty rather than juror perspective. *Id.* at 33-40.

40. *Court TV: People v. Simpson* (Court TV broadcast, Sept. 29, 1995) (emphasis added).

41. 2 CALIFORNIA JURY INSTRUCTIONS, CRIMINAL, § 17.40 (5th ed. Supp. July 1995).

42. I am mindful of the irony of this title, in a HASTINGS WOMEN'S LAW JOURNAL essay discussing gender issues. Perhaps this is the appropriate point to note that the law may well have been untroubled for so long regarding juror perspective because, for the bulk of common law history, women as well as minorities have been excluded from jury service. When all jurors are white men, issues of categorical perspective divergence could more easily remain submerged.

43. An example of the force of this idea is the "jury nullification" movement, which demands that jurors be informed of their "right" to vote to acquit even against the evidence, when their individual senses of justice so direct. *See* Thomas Eagleton, *Jury Nullification: Road to Anarchy*, ST. LOUIS POST-DISPATCH, July 30, 1995, at 3B.

44. *See infra* note 27 and accompanying text.

the sense of majoritarian or objective, about "reasonable doubt" under this view.[45]

Yet a powerful view can run to the contrary. First and foremost, the very use of the word "reasonable," long used to describe the sort of doubt that counts in a criminal trial, suggests an objective, non-individualistic standard.[46] Why would "reasonable" be used differently in this legal context than in others? Some experienced and scholarly thinkers seem also to suggest this view. For example, in his powerful article, *Beyond "Reasonable Doubt,"* Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit appears to reject the instructional idea "that a doubt is reasonable . . . if the juror can articulate . . . some particular reason for it."[47] He refers to this as "a distortion" of the reasonable doubt concept; the proper conception, says Judge Newman, should "prevent a finding of guilt unless the evidence dispels *those doubts that would be entertained by the most useful construct of the law—the reasonable person.*"[48] This conception suggests an objective, communitarian perspective; an idiosyncratic evaluation ought not be the jurors' role.[49]

To be fair, the statement I quote is an undeveloped aside in Judge Newman's comprehensive examination of the "beyond a reasonable doubt" concept as an appellate evaluative tool; he may not have intended this implication. But employing a "reasonable person" perspective for evaluating doubts in a criminal case would be consistent with the "communitarian" function of the jury,[50] as well as the general demand for consensus in final criminal jury verdicts.[51] Such a conception of reasonable doubt also embodies majestic aspirations for the criminal law:

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45. "Reasonable" does not lose all function in the individualistic conception, however. Individual jurors are still informed that a doubt upon which they are inclined to rely must be "reasoned," not illogical or silly. *See* FJC Instruction 21, *supra* note 24.

46. *See infra* notes 34-37 and accompanying text.

47. Newman, *supra* note 16, at 983.

48. *Id.* (emphasis added).

49. *See also* George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1, 9 (1992) (suggesting that a correct jury verdict is one that reflects "the judgment that society as a whole would reach"); Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 641 (1989) (suggesting that jurors in obscenity cases are "required by law" to "effectuate the 'community's' values").

50. *See* George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. (forthcoming 1996) (manuscript at 2-7, on file with author).

51. That is, verdicts of either conviction or acquittal must be unanimous; overwhelmingly, a criminal verdict is not final if jurors cannot agree. Of course, the Supreme Court has ruled that non-unanimous criminal jury verdicts can be constitutional. Johnson v. Louisiana, 406 U.S. 356, 363 (1972). But this even more strongly supports the idea that reasonable doubt is a communitarian, rather than an individualistic, conception in our criminal justice system. A minority is not held to delay conviction upon a majority's view of reasonableness.

that it be applied uniformly, with as little disparity as possible.[52] It also captures the majoritarian nature of criminal law itself, which at bottom must be representational of the community's shared understanding of behavioral norms necessary for society to survive.[53] Such a conception of "reasonable doubt" would require that idiosyncratic perspectives be abandoned by jurors, in favor of an objective, majoritarian perspective. Only doubts that are "reasonable" after such a non-subjective evaluation ought to prevent a finding of guilt.

In this brief essay, rather than further develop these thoughts, I will merely note that there is a tension regarding theories of juror perspective when evaluating reasonable doubt: jurors evaluating the evidence from their own subjective, individualistic perspectives versus jurors who put aside their own peccadillos in favor of some shared conception of doubts that are "reasonable." Judge Newman's article expresses (unconsciously, no doubt) this tension when, immediately after invoking the "reasonable person" standard for doubt, he describes a criminal jury as "twelve reasonable persons who form a reasonable jury" and then quotes a Supreme Court phrasing of the reasonable doubt test as "impressing upon the fact finder the need to reach a *subjective* state of near certitude" regarding guilt.[54] But what *are* we demanding of each juror: "subjective" or "objectively reasonable" doubt? None of the instructions we read to jurors even begin to say. Perhaps this silence reflects our own ambivalence.

II. Back To the Simpson Case and Its "Reasonable" Jurors

The Simpson jury consisted of ten women and two men. When they began to deliberate, they had to evaluate powerful evidence from both sides against the "reasonable doubt" standard. Of course, little joint deliberation apparently was necessary in the Simpson case, because unanimity was quickly found.[55] This might be explained by lop-sided

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52. Uniformity in application of the criminal law can be said to be an aspect of constitutional due process; if the law does not always achieve uniform application, it at least ought aspire to it. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 309-10 (Stewart, J., concurring); 28 U.S.C.A. § 991(b)(1)(B) (West Supp. 1995) (providing that one purpose of the United States Sentencing Commission is to establish sentencing policies that "avoid[ ] unwarranted sentencing disparities").

53. This is perhaps a very different aspect of the Court's statement in *Winship* that, "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community . . . ." *Winship*, 397 U.S. at 364.

54. Newman, *supra* note 16, at 983-34 (emphasis added) (quoting Jackson v. Virginia, 443 U.S. 307, 315 (1979)). By defining any twelve selected jurors as automatically "reasonable," this conception neatly avoids the issues I am raising here.

55. This jury has been criticized as not having "deliberated," because they were together less than four hours after the nine-month trial concluded. *E.g., Today* (NBC television broadcast, Oct. 3, 1995). This criticism seems misdirected, however; the surprise is not

evidence, sequestration, or the operation of innumerable other factors. But imagine the case if unanimity had not been immediately achieved. Instead, the jury is evenly split and lengthy deliberation about the evidence is necessary. Could the gender of the jurors make a difference? If an individualistic perspective is appropriate, and "reasonable women" could disagree with "reasonable men" about domestic violence issues, the answer would seem to be affirmative.[56]

A central fact in the Simpson trial is that (without any doubt) the defendant had physically abused the victim, his wife, on prior occasions.[57] Photographs of Nicole's previously bruised face and body were placed before the jury, and Nicole's panicked 911 call during one of Simpson's attacks ("he's back . . . . I think you know his record . . . .") was a centerpiece of the prosecutors' case and closing argument.[58] How should jurors evaluate this fact in deciding how likely it was that Simpson later came back after Nicole, this time to kill?

One can speculate—and that seems to be the limit of existing data on the question—that at least some women evaluate evidence of prior domestic violence differently than do some men. Crystal Weston states her evaluation clearly; the statistics about wife-battering, she says, "make[] it very easy and natural for me to believe that O.J. Simpson murdered Nicole."[59] The inference is that a man who has beaten his wife is likely to return to beat her again or kill her. For Weston, and indeed for many women, this inference is "easy and natural." But perhaps it is not so easy or natural for some men. It was not for Johnny Cochran, who argued to the jury that O.J. Simpson's prior attacks on his wife were irrelevant.[60] Perhaps—and again, this is pure speculation, as permitted only in law

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that the jury did not deliberate longer, but that, when it began to deliberate, virtually no opposed views regarding the force of the evidence apparently were expressed. This is not a lack of deliberation, but a lack of *need* for joint deliberation, because unanimity was speedily achieved. Each juror no doubt had "deliberated" individually, during nine months of sequestered trial.

56. In a similar vein, Professor Nancy King has argued that "juror race affects jury decisions in some [criminal] cases." Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 1993 MICH. L. REV. 63, 77; *see also* Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 U.C.L.A. WOMEN'S L.J., 35, 48-56 (1992) (arguing more tentatively that "gender may play a role" in jury deliberations).

57. *See* People v. Simpson, No. BA097211, 1995 WL 21768 at *1-4 (Cal. Super. Trans. Jan. 18, 1995) *available in* WETSLAW, OJ-TRANS.

58. *Court TV: People v. Simpson* (Court TV broadcast, Sept. 29, 1995).

59. Weston, *supra* note 4, at 225.

60. People v. Simpson, No. BA097211, 1995 WL 686429 at *35-40 (Cal. Super. Trans. Sept. 27, 1995) *available in* WESTLAW, OJ-TRANS. There is irony here, in that Johnny Cochran has also been accused, by his ex-wife, of spousal violence. *See* BARBARA COCHRAN BERRY, LIFE AFTER JOHNNY COCHRAN: WHY I LEFT THE SWEETEST-TALKING, MOST SUCCESSFUL BLACK LAWYER IN L.A. 79-82 (1995).

journal essays—some men do not want to believe that the incidence of repeat spousal violence is high or that such episodes are often connected. Men whose "common sense" runs contrary to Crystal Weston's may then have a "reasonable doubt" regarding the likelihood that it was O.J. Simpson on the night in question, where some "reasonable women" may have little or no doubt at all.

Reasoning from prior events to the likelihood of later ones is, of course, inferential and might not have technically been permitted by the Simpson instructions.[61] But such inferential reasoning is the stuff of which murder trials are made; murder is the one crime in which the victim is never available to give an eye-witness account. Thus the Simpson case was entirely "circumstantial" in this regard, and jurors were asked to divine "facts" that no one (other than possibly the defendant) could "know" absolutely. Juror perspective can be essential in determining the course of such an exercise; in this case, application of a "reasonable woman" standard for jurors applying the reasonable doubt standard might have made a difference.[62]

Perhaps the anger of women scholars about this trial reflects an underlying perspectival difference powerful enough to alter perceptions of reasonable doubt. Catherine MacKinnon has argued that the law's purported objectivity—reasonableness—is in fact male oriented and that such a gender-biased view ought to be purged.[63] If women react "reasonably," and yet differently than men, to domestic violence, may their different perspectives be permitted to control their jury deliberations? Further, if a purely individualistic juror perspective is permitted, then may parties in a criminal case seek to introduce evidence about the "reasonable woman's" perspective in order to assist male jurors in understanding

61. The evidence of O.J. Simpson's prior domestic violence was admitted for purposes of showing intent and motive only. *See supra* note 57. In his closing instructions to the jury, Judge Ito instructed that that evidence could not be used for any other purpose. People v. Simpson, No. BA097211, 1995 WL 672668 at *9 (Cal. Super. Trans. Sept. 22, 1995) *available in* WESTLAW, OJ-TRANS.

62. *Cf.* Ellison v. Brady, 924 F.2d 872, 878-80 (9th Cir. 1991) (applying a "reasonable woman" standard in sexual harassment cases under 42 U.S.C.A. §2000e-2(a)(1)); State v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977) (murder conviction of female defendant reversed because instructions suggested a "reasonable male" standard, rather than reasonable woman); Rachel A. Van Cleave, *A Matter of Evidence or Law? Battered Women Claiming Self Defense in California*, 5 UCLA WOMEN'S L.J. 217 (1994); Deborrah Ann Klis, *Reforms to Criminal Defense Instructions: New Patterned Jury Instructions Which Account for the Experience of the Battered Woman Who Kills her Battering Mate*, 24 GOLDEN GATE U. L. REV. 131 (1994) (California self-defense doctrine and the "battered woman syndrome").

63. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 162-63, 248-49 (1989). *Accord* Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV., 769, 770-80.

women's perspective once deliberations begin?[64] Such an expansion of the use of expert testimony would be revolutionary in practice; yet evidence rules comprehend admission of expert testimony that "will assist the trier of fact to understand the evidence."[65]

Thus opening the question of permissible juror perspective is unsettling in many directions. One shudders to imagine the possibilities if jurors are expressly told that "reasonable doubt" means—and means only—"any doubt you find convincing," no matter how idiosyncratic or uniformly rejected it might be by fellow jurors or society in general. Yet no less revolutionary would be an express direction to jurors that they should abandon even their firmly held doubts if they conclude the majority does not view them as "reasonable." Neither extreme seems right; "reasonable doubt" has components of individuality as well as communitarian assent.

The Simpson jurors were told nothing about perspective, other than to "decide the case for yourself."[66] Does "reasonable doubt" in fact mean "idiosyncratic doubt" in criminal cases? The law currently does not answer the question, and points, somewhat sheepishly, in both directions. Perhaps this silence is golden. Nevertheless, this case provides a special opportunity to further refine our thinking about the conception of reasonable doubt and the proper role of jurors. Such rethinking ought to be cause for celebration, in the otherwise joyless wake of the O.J. Simpson trial.

64. *See generally* Rick Brown, *Limitations on Expert Testimony on the Battered Woman Syndrome in Homicide Cases: The Return of the Ultimate Issue Rule*, 32 ARIZ. L. REV. 665 (1990).

65. FED. R. EVID. 702.

66. *See supra* note 40.